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No. 91-1693

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

CALIFORNIA-HAWAIIAN FUND, INC., ET AL.,
PETITIONERS

v.

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court order granting the Federal Deposit Insurance Corporation's (FDIC) petition to remove a fourth-party action from state to federal court was reviewable under the collateral order doctrine.

2. Whether the court of appeals' application of 28 U.S.C. 1447(d) to dismiss petitioners' appeal from the district court's order remanding their claims to state court violated petitioners' constitutional right to equal protection of the law.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	6
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	6
Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981)	6
Jensen Elec. Co. v. *Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327 (9th Cir. 1989)	5

Statutes:

Federal Courts Study Implementation Act of 1990, Pub. L. No. 101-650, § 312, 104 Stat. 5114 (28 U.S.C. 1441(c))	3
12 U.S.C. 1819(b)(2) (Supp. I 1989)	4
12 U.S.C. 1819(b)(2)(B) (Supp. I 1989)	4, 7
12 U.S.C. 1819(b)(2)(C) (Supp. I 1989)	6, 7
28 U.S.C. 1291	5, 6, 7
28 U.S.C. 1441	3
28 U.S.C. 1441(c)	3
28 U.S.C. 1442(a)(1)	3
28 U.S.C. 1447(c)	4
28 U.S.C. 1447(d)	5, 7

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OPINION BELOW

The opinions of the court of appeals (Pet. App. A1-A2) and the district court (Pet. App. A7-A24) are unreported.

JURISDICTION

The order of the court of appeals was entered on December 4, 1991. The petition for rehearing was denied on January 21, 1992. Pet. App. A3-A4. The petition for a writ of certiorari was filed on April 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioners and others (defendants)[1] entered into an agreement with Honolulu Federal Savings and Loan (Honfed) to purchase from Honfed 17 leasehold lots in a Hawaiian commercial center. Pet. App. A11. Respondent Honfed filed suit in Hawaii state court to collect fees allegedly owed by defendants in connection with requested extensions of the purchase closing date. *Ibid.* Defendants filed various state law counterclaims. The state court granted Honfed's motion for partial summary judgment on October 19, 1988.[2] *Id.* at A11-A12. On November 6, 1989, one of the defendants—petitioner Cal-Hawaiian—filed a third-party complaint against Triton Corp. and additional third-party defendants[3] alleging state law claims related to the purchase agreement, *id.* at A12. The new third-party defendants filed a counterclaim against third-party plaintiff Cal-Hawaiian and a cross-claim against original defendants Montgomery, Hugo Von Platen-Luder, McCommon, and Grossman, as well as Shirley Von Platen-Luder, who was not previously a party to the litigation. *Ibid.* These claims also arose from the purchase agreement and alleged various federal causes

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[1] These included Abraham Grossman, respondent Triton Continental Properties Corporation (Triton Corp.), and petitioners Triton Continental Properties Joint Venture (Triton JV), California-Hawaiian Fund, Inc. (Cal-Hawaiian), Michael B. Montgomery, Ronald D. McCommon, and Hugo Von Platen-Luder.

[2] The court dismissed Honfed's claims against Triton Corp., and Honfed settled its claims against Abraham Grossman.

[3] These included Hugh Conser and respondents Alvin K.H. Chee, James Adrian Adams, Sam S. Hironaka, and Chee-Hironaka.

of action, including securities fraud and unfair and deceptive trade practices. *Id.* at A12 & n.3.

On January 22, 1991, Hugo Von Platen-Luder filed a fourth-party action against the FDIC, the Resolution Trust Corporation (RTC) and the Office of Thrift Supervision (OTS). Pet. App. A12; see *id.* at A9. Shirley Von Platen-Luder then filed a notice of removal of the entire case to the United States District Court for the District of Hawaii. *Id.* at A75-A78. The removal was based upon the federal claims asserted against her as well as the fact that the fourth-party defendants were federal entities. On February 22, 1991, Honfed filed a motion opposing the removal and requesting sanctions, arguing that, under 28 U.S.C. 1441, the federal third-party cross-claims and counter-claims did not provide a valid basis for removal of the entire case. On July 2, 1991, the court entered an order holding that 28 U.S.C. 1441(c)[4] required it to reject Shirley Von Platen-Luder's petition to remove the case because the third-party cross-claim against her was not "separate and independent" from the non-removable claims, including Honfed's claim against the original defendants. Pet. App. A21.

The court also held that Shirley Von Platen-Luder could not remove under 28 U.S.C. 1442(a)(1). That provision permits removal of a civil action com-

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[4] As amended in 1990 (Federal Courts Study Implementation Act of 1990, Pub. L. No. 101-650, § 312, 104 Stat. 5114), Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

menced in a state court against any officer of the United States or any agency thereof "for any act under color of such office." Shirley Von Platen-Luder could not invoke that provision, the court held, because she was not a party to the fourth-party action against the federal agencies "upon which removal is based." [5] Pet. App. A21-A22. Accordingly, the court granted Honfed's motion to remand, *id.* at A21, and awarded attorneys' fees and costs to Honfed under 28 U.S.C. 1447(c). Pet. App. A23-A24.

2. On July 29, 1991, the FDIC filed a petition for removal under 12 U.S.C. 1819(b)(2)(B) (Supp. I 1989), which allows the FDIC to remove to the appropriate United States District Court "any action, suit, or proceeding" not specifically excepted in that Section. Pet. App. A97-A101. At a status conference held on August 6, 1991, the FDIC clarified its intent "to remove only that action to which it was a party, that is, the fourth-party complaint." *Id.* at A54. The court severed the fourth-party action and granted the petition for removal. *Id.* at A61-A62; see also *id.* at A25-A29.

3. Shirley Von Platen-Luder filed an appeal from the district court's July 2, 1991 order granting Honfed's motion for a remand and for sanctions, and petitioners also filed an appeal challenging the district court's decision to permit the FDIC to remove the fourth-party action. In a brief unpublished opin-

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[5] The court rejected the contention of the federal fourth-party defendants that Shirley Von Platen-Luder's request for removal should be granted based on 12 U.S.C. 1819(b)(2) (Supp. I 1989), which had been interpreted as permitting removal by any party of an action to which the FDIC is a party. The court noted that the removing party (Shirley Von Platen-Luder) and the FDIC were not parties to the same complaint and that Shirley Von Platen-Luder had not relied on Section 1819(b)(2) as a basis for removal. Pet. App. A22.

ion, the Ninth Circuit dismissed both appeals. Pet. App. A1-A2. In dismissing the first appeal, the court relied on 28 U.S.C. 1447(d) and *Jensen Elec. Co.* v. *Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327 (9th Cir. 1989). Section 1447(d) provides that "[a]n order remanding a case to the [s]tate court from which is was removed is not reviewable on appeal or otherwise." In *Jensen*, the court had held that an order granting attorneys' fees without determining a specific amount is not appealable. Pet. App. A2. In dismissing the second appeal, which challenged the district court's order removing the fourth-party claim to federal court, the court cited 28 U.S.C. 1291. That Section confers jurisdiction on the courts of appeals of "all final decisions of the district courts." The court denied as moot a motion to consolidate the two appeals. Pet. App. A2. On January 21, 1992, the court denied a petition for rehearing and suggestion of rehearing en banc in both appeals. Pet. App. A3-A4.

ARGUMENT

1. Petitioners ask this Court to review the court of appeals' decision to dismiss Shirley Von Platen-Luder's appeal from the district court's order remanding the entire case to state court. They also request review of the decision to dismiss a separate appeal from the district court's subsequent order granting removal of the fourth-party action. Pet. 15-17. Because the FDIC's motion to remove the fourth-party action was granted after the entire case had been returned to state court, the disposition of the first appeal (which concerns the fate of the remaining claims involving only private parties) does not

affect the federal respondents. Therefore, we do not discuss issues arising from that appeal.[6]

2. With respect to the second appeal, petitioners claim that, under the collateral order doctrine, the court of appeals should have reviewed the district court's order severing and permitting removal of the fourth-party action. The collateral order doctrine permits appeal of an interlocutory order that is otherwise unappealable under 28 U.S.C. 1291 only if the order satisfies three separate requirements: The resolution of the appeal must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 375 (1981); see also *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The district court's decision to permit removal of the fourth-party action will not be rendered effectively unreviewable if the action proceeds to final judgment in federal court, since the appellate court could consider the legality of the order permitting removal on appeal at the conclusion of the case.[7] Therefore, the court of appeals correctly declined to apply the collateral order doctrine to permit interlocutory appeal of the removal issue.

3. Petitioners claim (Pet. 18-21) that the combined effect of 12 U.S.C. 1819(b)(2)(C) (Supp. I

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[6] Those issues are addressed in the brief in opposition filed by Respondents Honfed, *et al.*

[7] Petitioner Hugo Von Platen-Luder is a party to the fourth-party action that has been removed to federal court. The removal issue would be effectively reviewable—and relief effectively available to all petitioners—if Hugo Von Platen-Luder chose to raise it on appeal.

1989) and 28 U.S.C. 1447(d)—which authorize the FDIC, but bar a private party, from appealing a district court order remanding a claim to state court (see Pet. App. A105, A110)—violates their right to equal protection of the laws. Therefore, they argue, Section 1447(d) cannot constitutionally be applied to prevent petitioners from appealing the order remanding the case to state court.[8]

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[8] Petitioners appear to be seeking the invalidation of Section 1447(d), upon which the court of appeals relied in dismissing their first appeal from the district court's remand order. They stand to gain nothing from the invalidation of 12 U.S.C. 1819 (b)(2)(C) (Supp. I 1989) in this case, since the FDIC has not invoked that Section here and petitioners thus have not been aggrieved by its application.

Although petitioners try to suggest otherwise (Pet. 18), they raise no equal protection issue relevant to the appeal from the order permitting the FDIC to remove the fourth-party action. The issue underlying that appeal has nothing to do with the FDIC's right to appeal from an order remanding a claim to state court under Section 1819(b)(2)(C)—the Section petitioners invoke in claiming a violation of their right to equal protection. Rather, the issue is whether the district court was correct to allow removal of the fourth-party action on the authority of an entirely different provision—Section 1819(b)(2)(B)—which permits the FDIC to remove to federal court any action to which it is a party. Petitioners do not challenge the district court's application of that provision before this Court. Nor could they, since the court of appeals declined to review the district court's removal order on the merits. Furthermore, the second appeal raises no issue concerning the validity of 28 U.S.C. 1447(d), since its dismissal was not based on that Section but, rather, on 28 U.S.C. 1291. See Pet. App. A2. Thus, any disparity created by the combined effect of 28 U.S.C. 1447(d) and 12 U.S.C. 1819 (b)(2)(C) (Supp. I 1989) has no bearing on the court of appeals' decision dismissing the second appeal.

There is no equal protection violation here. Petitioners have no "fundamental right" to adjudication of their claims in federal court or to appellate consideration of an order returning their case to state court. Nor do private parties seeking to appeal a remand order represent a protected class. Thus, the scheme created by the statutes at issue need only be rationally related to a legitimate government interest. There is a rational basis for permitting the FDIC to appeal remand orders that a private party may not appeal. Prohibiting immediate appeals by private parties prevents delays in litigation that would result from appellate challenges to remand orders. Congress may rationally conclude, however, that the FDIC has a greater interest than a private party in ensuring that cases to which it is a party be heard in federal rather than state court. Congress may also rationally conclude that that interest extends to the right to appeal from orders remanding to state court. Thus, Congress could reasonably have decided that the FDIC's need to ensure that its cases remain in federal court outweighed any additional delay that might result from allowing the FDIC to appeal remand orders.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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